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Supreme Court, U.S.
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No. 93-50

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN ERNEST BISHOP, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner was not denied the effective assistance of counsel due to an alleged conflict of interest.

2. Whether the court of appeals erred by reaching the merits of petitioner's claim of ineffective assistance of counsel.

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OPINION BELOW

The decision of the court of appeals, Pet. App. 1-9, is not reported, but its judgment is noted at 987 F.2d 772 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1993. A petition for rehearing was denied on April 7, 1993. Pet. App. 10. The petition for a writ of certiorari was filed on July 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to distribute LSD, in violation of 21 U.S.C. 846, and distributing LSD, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 121 months' imprisonment, five years' supervised release, and a $2,000 fine. The court of appeals affirmed. Pet. App. 1-9.

From 1989 to 1991, petitioner regularly supplied LSD to Chris Kasper, who resold the LSD to students at the college that Kasper attended. In 1991, Kasper sold LSD to a state undercover agent. Kasper subsequently led state and federal undercover agents to petitioner's apartment. While the agents waited outside, petitioner gave Kasper some LSD for resale to the agents for $2,500. In November 1991, law enforcement agents arrested Kasper in front of petitioner's apartment building. The agents executed a search warrant at petitioner's apartment on the same day and seized LSD and documents showing that petitioner was a drug dealer. Gov't C.A. Br. 3-10.

Kasper testified for the government at petitioner's trial. On cross-examination, Kasper admitted that he was hoping for a reduced sentenced based on his cooperation with the government. He also admitted that he had repeatedly lied to the agents about petitioner's role, his own role, and the participation of third parties in the LSD scheme. Gov't C.A. Br. 14-15. At the end of the defense case, petitioner's attorney sought to testify that before the case began, Kasper had come to his office seeking legal representation and had told him that petitioner was not involved in the LSD scheme. After the government objected that it was "highly improper" for defense counsel to announce at that late date that "he's some kind of witness," the district court barred peti-

tioner's attorney from testifying about any discussions that he may have had with Kasper. Pet. App. 3.

The court of appeals affirmed. Among other arguments, it rejected petitioner's claim that he had been denied the effective assistance of counsel. First, the court held that although it normally would not consider an ineffective assistance claim that had not been raised below, the record in this case was sufficiently complete for the court to determine the merits of the claim. Pet. App. 6. The court next held that petitioner's attorney did not actively represent conflicting interests at trial because he never represented Kasper, having only consulted with him. In any event, any assumed conflict did not adversely affect the attorney's performance since the record showed that the attorney vigorously cross-examined Kasper and established a foundation for the jury to conclude that Kasper was a biased witness and a liar. The court further rejected petitioner's claim that the attorney erred in failing to point out Kasper's exculpatory statement to him on cross-examination. The court explained that the attorney had the option of impeaching Kasper or building up his credibility in anticipation of bringing out the exculpatory statement, and that the attorney's choice between those strategies was reasonable. *Id.* at 7-8.

ARGUMENT

1. Petitioner first contends (Pet. 7-13) that he was deprived of the right of effective assistance of counsel. There is no merit to that claim.

A criminal defendant has a Sixth Amendment right to the effective assistance of counsel. To show a violation of that right, a defendant must show that his counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). If a defendant

claims that his attorney performed under a conflict of interest, prejudice will be presumed only if the defendant shows that the attorney "actively represented conflicting interests" and that the conflict "adversely affected" the attorney's performance. *Id.* at 692.

An attorney who represents a criminal defendant after having represented a client who is now a government witness against the defendant faces a potential conflict of interest in that his interest in vigorously cross-examining his prior client on behalf of the defendant may conflict with his duty to preserve his prior client's secrets and confidences. See *United States* v. *Bowie*, 892 F.2d 1494, 1501 (10th Cir. 1990); *United States* v. *Soudan*, 812 F.2d 920, 927 (5th Cir. 1986), cert. denied, 481 U.S. 1052 (1987). But because a potential conflict of interest is not enough to demonstrate ineffective assistance of counsel, a defendant does not establish ineffective assistance merely by showing that his attorney cross-examined a former client. *United States* v. *Olivares*, 786 F.2d 659, 663 (5th Cir. 1986).

Petitioner's attorney did not actively represent conflicting interests at petitioner's trial. First, because the attorney never represented Kasper, it was unlikely that Kasper divulged any secrets or confidences to the attorney during their brief consultation. In addition, once Kasper pleaded guilty, it was unlikely that anything Kasper had told the attorney was still a secret. Accordingly, the attorney was not burdened by a need to preserve Kasper's secrets when he cross-examined Kasper at petitioner's trial, and there is no reason to believe that the attorney's cross-examination of Kasper was restrained because of the attorney's prior consultation with Kasper.

In addition, the attorney's performance at trial was not adversely affected by his prior consultation with Kasper. As noted by the court of appeals, Pet. App. 7, petitioner's

attorney "vigorously" cross-examined Kasper at trial. Petitioner's attorney established that Kasper was expecting a lenient sentence in exchange for his cooperation with the government and that Kasper had repeatedly lied to the undercover agents about his role, petitioner's role, and the role of third parties in the offense. See *United States* v. *Olivares*, 786 F.2d at 663 (attorney was not "adversely affected" by his prior representation of a witness when he thoroughly cross-examined the witness at trial and exposed him as a liar).[1]

2. Petitioner also contends (Pet. 13-22) that the court of appeals erred in reaching the merits of his ineffective assistance of counsel claim. There is no merit to that contention.

The basis for petitioner's claim that the court of appeals should not have reached his ineffective assistance argument is that he did not raise the issue in the district court. For that reason, he contends, the record was insufficient to permit the court of appeals to reject his

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[1] Petitioner contends (Pet. 19) that his attorney's failure to cross-examine Kasper about his exculpatory statement to the attorney showed that he was actively representing conflicting interests. But as noted by the court of appeals, Pet. App. 7-8, once petitioner's attorney decided to impeach Kasper by showing that he was a liar, it would have made little sense to then suggest that Kasper was telling the truth when he said that petitioner was innocent. A major point of counsel's cross-examination of Kasper was to establish that Kasper lied when he characterized petitioner's role in the offense. Counsel could hardly then do an about-face and rely on the credibility of a statement by Kasper regarding petitioner's alleged non-involvement in the criminal scheme. Of course, counsel could not have introduced the unsworn prior inconsistent statement of Kasper through counsel's own testimony in the defense case as proof of petitioner's innocence. Setting aside the impropriety of counsel's being a witness in a case in which he was representing a party, Kasper's statement was hearsay and not admissible for its truth. See Fed. R. Evid. 801(d)(1)(A).

claim. But if petitioner believed that the record needed further factual development, he should have asked the court of appeals to remand the case for an evidentiary hearing on the issue, or he should have filed a separate action under 28 U.S.C. 2255 raising the issue. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984). He should not now complain about the alleged inadequacy of the record after he urged the court of appeals to decide the issue on the merits.[2]

To be sure, courts of appeals normally will not reach the merits of an ineffective assistance of counsel claim that is raised for the first time on appeal. Instead, they will advise the defendant to raise the issue in a separate Section 2255 motion. If the court of appeals determines that the record is adequate, however, it may reach the merits of the ineffective assistance of counsel claim even though the issue was not raised below. See, *e.g.*, *United States* v. *Guerrero*, 938 F.2d 725, 726-727 n.1 (7th Cir. 1991); *United States* v. *Wunder*, 919 F.2d 34, 37 (6th Cir. 1990); *United States* v. *Hilliard*, 752 F.2d 578, 580 (11th Cir. 1985); *United States* v. *Aulet*, 618 F.2d 182, 185-190 (2d Cir. 1980). Thus, having concluded that the record was adequate to decide petitioner's ineffective assistance of counsel claim, the court of appeals properly reached the merits of the claim.[3]

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[2] In the court of appeals, petitioner did not ask for a remand for an evidentiary hearing on the issue. Although petitioner noted in passing that an evidentiary hearing might be appropriate to help decide the issue, Pet. C.A. Br. 19, his prayer for relief asked only for a reversal of his conviction and a new trial, *id.* at 24.

[3] Petitioner's disagreement (Pet. 13-16) with the court of appeals concerning the adequacy of the record raises a purely factual question that warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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